

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. 14-cv-00341-JPH

MELISSA MARIE VANSICKLE,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 16. Attorney Dana C. Madsen represents plaintiff (Vansickle). Special Assistant United States Attorney L. Jamala Edwards represents defendant (Commissioner). The parties consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court

1 **grants** defendant's motion for summary judgment, ECF No. 16.

2 **JURISDICTION**

3 Vansickle applied for disability insurance benefits (DIB) and supplemental  
4 security income disability benefits (SSI) on May 17, 2011, alleging onset beginning  
5 March 2, 2009 (Tr. 143-49, 150-58). The claim was denied initially and on  
6 reconsideration (Tr. 94-97, 100-03).

7 Administrative Law Judge (ALJ) Donna L. Walker held a hearing June 11,  
8 2013. Vansickle, represented by counsel, and medical and vocational experts  
9 testified (Tr. 28-59). On June 20, 2013, the ALJ issued an unfavorable decision (Tr.  
10 12-21). The Appeals Council denied review August 29, 2014 (Tr. 1-6), making the  
11 ALJ's decision final. On October 21, 2014 Vansickle filed this appeal pursuant to 42  
12 U.S.C. § 405(g). ECF No. 4.

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing transcript, the  
15 ALJ's decision and the parties' briefs. They are only briefly summarized here and  
16 throughout this order as necessary to explain the Court's decision.

17 Vansickle was 27 years old at onset and 31 at the hearing. She has a tenth  
18 grade education and has not earned a GED. She lives with her son who was four  
19 years old at the hearing. She has worked as a nursing assistant/home attendant, retail  
20 manager, housekeeper, child monitor and retail clerk. She has a driver's license but

1 driving is painful. She has had anxiety all her life; this, and pain, cause sleep  
2 problems. Pain also limits walking to one block and standing to ten minutes (Tr. 40,  
3 44-45, 51-53, 55, 201).

#### 4 **SEQUENTIAL EVALUATION PROCESS**

5 The Social Security Act (the Act) defines disability as the “inability to engage  
6 in any substantial gainful activity by reason of any medically determinable physical  
7 or mental impairment which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than twelve months.” 42  
9 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall  
10 be determined to be under a disability only if any impairments are of such severity  
11 that a plaintiff is not only unable to do previous work but cannot, considering  
12 plaintiff’s age, education and work experiences, engage in any other substantial  
13 work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
14 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and  
15 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

16 The Commissioner has established a five-step sequential evaluation process  
17 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
18 one determines if the person is engaged in substantial gainful activities. If so,  
19 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
20 decision maker proceeds to step two, which determines whether plaintiff has a

1 medially severe impairment or combination of impairments. 20 C.F.R. §§  
2 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If plaintiff does not have a severe impairment or combination of impairments,  
4 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
5 the third step, which compares plaintiff's impairment with a number of listed  
6 impairments acknowledged by the Commissioner to be so severe as to preclude  
7 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
8 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
9 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
10 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
11 step, which determines whether the impairment prevents plaintiff from performing  
12 work which was performed in the past. If a plaintiff is able to perform previous work  
13 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
14 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
15 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
16 the process determines whether plaintiff is able to perform other work in the national  
17 economy in view of plaintiff's residual functional capacity, age, education and past  
18 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
19 *Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish a *prima facie* case

1 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
2 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
3 met once plaintiff establishes that a mental or physical impairment prevents the  
4 performance of previous work. The burden then shifts, at step five, to the  
5 Commissioner to show that (1) plaintiff can perform other substantial gainful  
6 activity and (2) a “significant number of jobs exist in the national economy” which  
7 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### 8 **STANDARD OF REVIEW**

9 Congress has provided a limited scope of judicial review of a Commissioner’s  
10 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,  
11 made through an ALJ, when the determination is not based on legal error and is  
12 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
13 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). “The [Commissioner’s]  
14 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
15 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
16 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,  
17 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
18 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).  
19 Substantial evidence “means such evidence as a reasonable mind might accept as  
20 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401

1 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]  
2 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,  
3 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a  
4 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*  
5 *v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
6 526 (9<sup>th</sup> Cir. 1980)).

7 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence.  
8 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
9 interpretation, the Court may not substitute its judgment for that of the  
10 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
11 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
12 set aside if the proper legal standards were not applied in weighing the evidence and  
13 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
14 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
15 administrative findings, or if there is conflicting evidence that will support a finding  
16 of either disability or nondisability, the finding of the Commissioner is conclusive.  
17 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

### 18 **ALJ’S FINDINGS**

19 ALJ Walker found plaintiff was insured through December 31, 2011 (Tr. 12,  
20 14). She found at step one that Vansickle did not work at SGA levels after onset (Tr.

14). At steps two and three, she found plaintiff suffers from degenerative disc disease of the cervical spine, an impairment that is severe but does not meet or medically equal a Listed impairment (Tr. 14, 16). The ALJ found Vansickle less than fully credible (Tr. 17). She found plaintiff is able to perform a range of medium work (Tr. 16). At step four, the ALJ relied on a vocational expert and found plaintiff is able to perform her past relevant work as a child monitor, home attendant, retail clerk and housekeeper (Tr. 19, 56). Alternatively, at step five, the ALJ again relied on expert testimony and found plaintiff can perform other jobs, such as assembler, hand packager and laundry worker (Tr. 19-20, 56). The ALJ found Vansickle is not disabled as defined by the Act (Tr. 21).

## ISSUES

Plaintiff alleges the ALJ erred when she evaluated the evidence and assessed credibility. ECF No. 14 at 9-13. The Commissioner responds that the ALJ's findings are factually supported and free of harmful legal error. She asks the court to affirm. ECF No. 16 at 3.

## DISCUSSION

### *A. Credibility*

Plaintiff alleges the ALJ failed to properly support her credibility assessment. ECF No. 14 at 9-12.

When presented with conflicting medical opinions, the ALJ must determine

1 credibility and resolve the conflict. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
2 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ's credibility findings must be  
3 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup>  
4 Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for  
5 rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*,  
6 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient: rather the ALJ  
7 must identify what testimony is not credible and what evidence undermines the  
8 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918  
9 (9<sup>th</sup> Cir. 1993).

10 The ALJ's finding is fully supported.

11 In February 2009 plaintiff failed to follow through with recommended  
12 physical therapy (Tr. 14). After a car accident a month later, in April 2009, she was  
13 again advised to undergo physical therapy. She did not regularly show up for  
14 treatment as prescribed and was ultimately discharged (Tr. 14, citing Ex. 1F at Tr.  
15 197-206). Vansickle testified she stopped going because the treatments caused pain  
16 (Tr. 44). This explanation is arguably not supported by the record. *See* Tr. 199, 201,  
17 204-06, 211, 215. However, even if the explanation is deemed acceptable, the ALJ's  
18 other reasons are clear, convincing and supported by substantial evidence.

19 There is evidence suggesting drug seeking behavior. In June 2010 plaintiff  
20 asked for an early refill of pain medication. In August 2010 she again asked to refill



1 medications early because, she claimed, someone stole them (Tr. 15, 207, 242, 249).  
2 In July 2012 it is noted that Vansickle repeatedly “refused to have her blood drawn  
3 and requested benzodiazepine to calm herself” (Tr. 15, referring to Tr. 327-28). A  
4 test drawn July 23, 2012 was positive for benzodiazepine (xanax) and marijuana, in  
5 violation of plaintiff’s pain contract (Tr. 15, referring to Tr. 335). Her treatment  
6 provider strongly recommended a comprehensive drug assessment (Tr. 335). In  
7 September 2012 plaintiff said she had ingested marijuana tea for nausea and did not  
8 know how xanax got into her system. When told controlled substances would no  
9 longer be prescribed until an assessment was completed or lab results returned  
10 clean, plaintiff became angry. She admitted drinking her brother’s marijuana drink  
11 daily. She left the room before a physical exam could be done or labs taken (Tr. 15,  
12 referring to Tr. 337, 339-41). In October 2012 plaintiff repeatedly requested  
13 benzodiazepine in the ER for GI complaints, but was refused (Tr. 15, referring to Tr.  
14 288).

15 Objective medical evidence does not support the level of claimed impairment  
16 (Tr. 15, 17). In March 2009 plaintiff was seen getting on and off the exam table with  
17 no signs of any discomfort. In November 2009 a physical therapist notes strength in  
18 both arms is 5/5. December 2009 treatment notes show plaintiff was seen for neck  
19 pain, but she was well groomed, active, moved without difficulty and did not appear  
20 to be in pain (Tr. 197, 212, 235). Plaintiff testified she vomited for six to nine

1 months to a year around October 2012 and lost 80 pounds (Tr. 47-48). Medical  
2 records do not support this assertion. *See* Tr. 287-88, noting metabolic panels are all  
3 normal despite claims of vomiting 8 to 10 times a day for 8 months; Tr. 337-38,  
4 noting inconsistent reporting of GI symptoms.

5 Activities overall also suggest greater functional capacity than plaintiff's  
6 testimony described. She drives. She was able to care for her son as an infant and  
7 toddler, at times as a single parent (Tr. 17, 209, 220, 222, 225, 231, 249, 274, 277,  
8 361). Medical evidence does not reflect a worsening condition that would support  
9 the degree of limitation alleged (Tr. 17; *see e.g.*, Tr. 259, 285, 296: September 2009  
10 MRI cervical stenosis without radiculopathy; November 2010 lumbar MRI  
11 essentially normal).

12 Unexplained or inadequately explained failure to follow recommended  
13 treatment suggests limitations are not as severe as alleged. An ALJ may properly  
14 consider this when assessing credibility. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039  
15 (9<sup>th</sup> Cir. 2008)(citation omitted). Drug seeking behavior may be evidence of "a  
16 tendency to exaggerate pain." *See Edlund v. Massanari*, 253 F.3d 1152, 1157 (9<sup>th</sup>  
17 Cir. 2001)(holding that the likelihood that claimant was exaggerating complaints of  
18 pain to "feed his Valium addiction" supported the ALJ's decision to reject his  
19 testimony). Although lack of supporting medical evidence cannot form the sole basis  
20 for discounting pain testimony, it is a factor the ALJ can consider when analyzing

1 credibility. *Burch v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005). Subjective  
2 complaints contradicted by medical records and by daily activities are properly  
3 considered. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9<sup>th</sup> Cir.  
4 2008); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup> Cir. 2002). And, the ability to  
5 care for young children may be inconsistent with disabling limitations. *Rollins v.*  
6 *Massanari*, 261 F.3d 853, 856 (9<sup>th</sup> Cir. 2001).

7 The ALJ’s credibility assessment is supported by the evidence and free of  
8 harmful error.

9 *B. Medical evidence*

10 Vansickle alleges the ALJ failed to properly weigh the March 2013 opinion of  
11 Ginger Blake, ARNP. ECF No. 14 at 12-13; Tr. 293-95. The Commissioner  
12 responds that the ALJ gave germane reasons for rejecting this opinion: it is  
13 inconsistent with treatment notes and with the medical and testimonial evidence as a  
14 whole. ECF No. 16 at 13-14.

15 The Commissioner is correct.

16 In March 2013 Ms. Blake opined plaintiff could perform sedentary work, but  
17 no more than one to ten hours per week (Tr. 293-94). In July of 2012, Ms. Blake  
18 was the treatment provider who had strongly recommended an assessment for  
19 substance abuse (Tr. 335).

20 An ALJ may properly reject any opinion that is brief, conclusory and

1 inadequately supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d 1211,  
2 1216 (9<sup>th</sup> Cir. 2005). Opinions that are internally inconsistent may properly be given  
3 less weight. *See Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 603  
4 (9<sup>th</sup> Cir. 1999).

5 Vansickle alleges the ALJ erred by considering DSHS evaluations in general,  
6 and the sympathy of providers and the context of secondary gain, when she rejected  
7 Ms. Blake's opinion. ECF No. 14 at 13. The Commissioner responds that the ALJ  
8 gave germane reasons, as is appropriate for non-acceptable sources. ECF No. 16 at  
9 13-16.

10 The Commissioner is correct.

11 Nurse practitioners such as Ms. Blake are not acceptable medical sources. As  
12 such, if an ALJ rejects their opinion, reasons germane to the witness must be given.  
13 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9<sup>th</sup> Cir. 2012)(citations omitted).

14 The ALJ notes the assessed limitations are made on a check-box form (Tr.  
15 18). These are entitled to little weight, particularly when (as is the case here) the  
16 report does not contain an explanation of the bases for the conclusions. *Crane v.*  
17 *Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996).

18 The assessed RFC is also inconsistent with treatment notes. (Tr. 18-19, 294).  
19 The notes do not reflect such extreme limitations. Treatment notes, for example,  
20 describe asthma as well controlled (Tr. 274). Ms. Blake's check-box opinion

1 indicates asthma limits work. This is a germane reason.

2       The ALJ notes Ms. Blake's opinion is inconsistent with other evidence. Minh  
3 D. Vu, M.D., [misspelled Niem Vu in the RP], reviewed the complete record. He  
4 testified plaintiff's cervical condition is a severe impairment but lumbar conditions  
5 and asthma are not (Tr. 34-35, 131). He opined plaintiff could perform a range of  
6 medium work (Tr. 35-36). The ALJ considered and gave this opinion significant  
7 weight (Tr. 18). This too is a germane reason.

8       Because the ALJ gave germane reasons supported by the record for rejecting  
9 Blake's more extreme limitations, error if any in relying on the purpose of the  
10 opinion (obtaining DSHS benefits) or the provider's possible sympathy is clearly  
11 harmless.

12       Plaintiff essentially alleges the ALJ should have weighed the evidence  
13 differently, but the ALJ is responsible for reviewing the evidence and resolving  
14 conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup>  
15 Cir. 1989). It is the role of the trier of fact, not this court, to resolve conflicts in  
16 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
17 interpretation, the Court may not substitute its judgment for that of the  
18 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
19 1984). If there is substantial evidence to support the administrative findings, or if  
20 there is conflicting evidence that will support a finding of either disability or

1 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812  
2 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

3 The ALJ's determinations are supported by the record and free of harmful  
4 legal error.

5 **CONCLUSION**

6 After review the Court finds the ALJ's decision is supported by substantial  
7 evidence and free of harmful legal error.

8 **IT IS ORDERED:**

9 Defendant's motion for summary judgment, **ECF No. 16**, is **granted**.

10 Plaintiff's motion for summary judgment, ECF No. 14, is denied.

11 The District Court Executive is directed to file this Order, provide copies to  
12 counsel, enter judgment in favor of defendant and **CLOSE** the file.

13 DATED this 18th day of August, 2015.

14 S/ James P. Hutton

15 JAMES P. HUTTON  
16 UNITED STATES MAGISTRATE JUDGE  
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